occupied for exclusive federal use are logically subject to a similar encumbrance.

On the other hand, if a state's public trust easement is terminated by federal condemnation and occupation of the subject lands, this case raises the issue of whether the state government may suddenly reassert that easement when the lands are conveyed to a private owner, and so deny the owner's right to exclude others, without compensation. The highest state courts are in conflict on this important issue of federal constitutional law.

A. Facts

This case has its genesis in the federal government's condemnation of shoreline property and adjacent submerged lands in the Town of Long Island, Maine, (Town) prior to World War II. Appendix A at 2. The submerged lands portion of the property includes a pier running into Casco Bay, an adjacent, angled breakwater, and several small wood structures, which together form a small boat pool. *Id.* The condemned area includes property below and above the low tide line. The United States government sought the property for purposes of operating a Naval fuel annex. *Id.*

The United States' 1942 petition for condemnation identified the shoreline property to be taken as bounded by the "ordinary high water mark of Casco Bay." *Id.* The Petition identified the City of Portland,[1] the County of Cumberland, and the State of Maine as parties that "may have or claim to have some interest in and to" the lands. *Id.* This Petition was served on the State of Maine, which statutorily consented to the taking. Appendix B at 9; *see also*, Revised Statutes of Maine, 1930,

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[1] At the time of the condemnation, the Defendant Town of Long Island was part of the City of Portland, Maine. Appendix B at 1.

c.2, § 10 (allowing federal condemnation of any state lands for "public buildings or any other purposes of the [federal] government").

The government's subsequent declaration of taking was more inclusive, stating that the condemned property was to include "all right, title and interest in the adjacent submerged lands." Appendix A at 3. The initial judgment on the declaration adopted this latter description. The final judgment on the declaration, entered on April 6, 1945, stated that the United States had taken "full fee simple title (including . . . all right, title and interest in the adjacent submerged lands)."[2] *Id.*

Upon taking possession, the Navy fully occupied the submerged lands adjacent to the upland property it had taken. Appendix B at 2. It exercised exclusive control of the small boat pool, which "was not accessible by land because the upland Navy facility was fenced and guarded and access . . . by sea was completely and exclusively regulated by the Navy." *Id.* In short, "[t]he submerged lands were not kept open for public use" during federal control. *Id.* at B11.

In 1964, the United States conveyed the property to John S. Norton Sr., by a quitclaim deed, which described the property as "along the [ordinary] high water mark of Casco Bay and along the shore line of Long Island." Appendix A at 3. In 1965, the federal government executed a "confirmatory" quitclaim deed describing the property in the same way. Upon taking possession, Mr. Norton exercised exclusive control of the property, allowing "certain boats to moor in the pool, [but] exclud[ing] others." Appendix B at 2. Mr. Norton later used the pool as a boat harbor in connection with his lobster business.

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[2] The federal government's taking also included several streets abutting the shoreline of Casco Bay. Appendix A at 3-4. The ownership of these roads is in dispute, but this Petition does not seek review of that issue.

In the 1980's, the United States government executed two additional deeds. Appendix A at 4. The first, issued in 1986, declared that it had been the United States' intent to convey the pier and the adjacent breakwater to John Norton Sr. by the 1965 deed. *Id.* A deed executed in 1989 further stated that the prior deeds had granted "submerged land adjacent to a parcel of property and bulkhead, said property formerly being a part of the U.S Naval Fuel Annex situated on Long Island." *Id.*

In approximately the year 2000, the Town's Harbormaster told members of the public that they had a right to moor their boats over and on John Norton Sr.'s submerged lands. Appendix C at 5. Other Town officials asserted that the pool was public property. *See id.* at C-6.

B. Judicial Proceedings

In 2002, John Norton Sr. sued the Town of Long Island and the State of Maine in state court.[3] Appendix A at 6. Among other claims, the suit sought to quiet title to the small boat pool and underlying submerged lands. It further requested just compensation under the Federal Takings Clause for the Town and State's attempt to open the small boat pool for general public use. *Id*; *see also* Appendix C.

In considering the claims, the Maine Superior Court held that "the United States did not have the authority to convey the submerged land to private parties because the lands were, and presently are, held in public trust." Appendix B at12. The trial court specifically held that the federal government had originally taken the submerged lands subject to the state's public trust doctrine interests and had therefore conveyed the property to John Norton Sr. subject to a public trust easement. *Id.* at 13. The trial court therefore rejected the plaintiff's claim

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[3] After the death of John Norton Sr., John Norton Jr. was substituted as the plaintiff in his capacity as representative of his father's estate. Appendix B at 1.

of a right to exclude the public and dismissed his claim for just compensation under the Federal Takings Clause for loss of that right. *Id.*

On October 11, 2005, the Supreme Judicial Court of Maine upheld the judgment of the trial court. The state supreme court concluded that the United States intended to take all right and interest in the submerged lands for military use, but nevertheless did not acquire the lands free of the State's public trust easement because it had not specifically declared that the public trust interest was to be taken. Appendix A at 18-19. The court concluded that the federal government had properly conveyed title to the submerged lands to John Norton Sr., but, because the title was subject to the State's public trust easement, Mr. Norton had obtained the submerged lands with an active public trust easement. The easement, the court explained, both "allows the public to use the submerged lands for fishing and navigation," *id.* at A-19, and "prevents Norton from excluding members of the public who wish to navigate or fish within the small boat pool." *Id.* Based on this reasoning, the court affirmed the dismissal of Mr. Norton's federal takings claim.

REASONS FOR GRANTING THE WRIT

On two important questions of law related to the sovereign powers of the federal and state governments, the court below reached a decision that improperly curtails the rights of the federal government and private property owners, in conflict with the decision of this Court and other courts.

ARGUMENT

I

WHETHER FEDERAL CONDEMNATION AND OCCUPATION OF SUBMERGED LANDS EXTINGUISHES A STATE'S "PUBLIC TRUST" EASEMENT IS AN IMPORTANT ISSUE OF LAW ON WHICH THE DECISION BELOW CONFLICTS WITH THIS COURT AND WITH LOWER FEDERAL COURTS

As noted above, the lower court resolved Mr. Norton's claim of a right to exclude the public from his submerged lands on the issue of whether the federal government—Mr. Norton's predecessor in interest—took the property subject to a public trust easement when it condemned all interest in the property and then occupied it. The decision below accordingly involves a clash between the public trust doctrine and the federal power of eminent domain, two of the most entrenched sovereign powers of the state and federal governments. The lower court's resolution of this clash in favor of the state has untenable ramifications for federal sovereignty, conflicts with this Court's precedent, and highlights confusion among the lower federal courts on whether lands condemned and/or occupied by the federal government remain subject to a state public trust easement.

A. The Sovereignty Interests at Issue

1. The Federal Power of Eminent Domain

The power of eminent domain is among those rights surrendered to the United States at the time of its formation. *United States v. Carmack*, 329 U.S. 230, 236 (1946). This power has been codified in several statutes, the most pertinent of which is the Declaration of Taking Act, Pub. L. no. 71-736, ch. 306, 46 Stat. 1421. That act permits the federal government to condemn property by declaring the area and interests to be

taken. *See id.* At the time of the condemnation here, the United States Navy was also authorized to condemn land for military use under the Second War Powers Act of 1942, Public Law Number 77-507, ch. 199, § 201, 56 Stat. 176, 177 (repealed 1947). It is not necessary for the United States to formally condemn land in order to lawfully acquire it; it may also physically occupy property. *United States v. Dow*, 357 U.S. 17, 21 (1958).

"An unqualified appropriation in fee simple by the United States . . . creates a new title" so that "all previous existing estates or interests in the land are obliterated." *United States v. 25.936 Acres of Land, More or Less, in Borough of Edgewater, Bergen County, N.J.*, 153 F.2d 277, 279 (3rd Cir. 1946) (*citing Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924)). Similarly, federal occupation establishes a federal intent to fully take the lands and negates any need for specific, written notice of the interest being condemned. *Dow*, 357 U.S. at 22. Federal occupation, like formal condemnation, "extinguishes all previous rights." *Duckett*, 266 U.S. at 151. A taking of submerged lands vests all interests and rights in the United States whether or not it has paid just compensation to a state. *United States v. 422,978 Square Feet of Land, in the City and County of San Francisco*, 445 F.2d 1180, 1181 (9th Cir. 1971) (state not entitled to compensation for taking by physical occupation); *see also United States v. Commodore Park*, 324 U.S. 386, 390-92 (1945) (owner of submerged lands does not have a right of compensation against the United States even if the purpose of the taking is not to improve navigation). When the United States acquires submerged lands, those lands become subject to the United States' "unlimited" power to dispose of federal property. *See Alabama v. Texas*, 347 U.S. 272, 273-74 (1954) (rejecting dissent's argument that the United States holds submerged lands in trust for the states).

2. The Public Trust Doctrine

The public trust doctrine is a common law property doctrine under which the states hold an easement over tidal lands for certain public uses. The states originally acquired title to most submerged, tidal lands in their territory upon admission to the union. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). In *Illinois Central R. Company v. State of Illinois*, this Court made clear that this title was qualified by a common law right of the public to use such lands for purposes of navigation, fishing and commerce. 146 U.S. 387, 452 (1892). Under this "public trust doctrine," states hold submerged lands in trust for the public, for the purpose of securing traditional public rights. *Id.* ("It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein .").

The public trust doctrine imposes some restrictions on the states' ability to grant exclusive control of submerged tidal lands to a private party. *Illinois Central* established that the states typically may not convey larger areas of submerged lands to a private party free of the public rights protected by the public trust doctrine. *Id.* at 452-53. Instead, the public trust runs with title to such lands, and the state retains control for purposes of administrating the public trust. *Id.* Yet, *Illinois Central* also recognized that states could divest themselves of the public trust interest in smaller areas of submerged lands, and convey the state's entire interest to a private party, if private ownership would not threaten the public's ability to use the surrounding waterway. *Id.* at 455-56.

> The trust with which [the submerged lands] are held . . . cannot be alienated, except . . . of parcels used in the improvement of the interest thus held, or when

> parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

Id.

The State of Maine has construed the state's public trust doctrine to apply to all navigable and nonnavigable tidal waters and underlying submerged lands, up to the high water mark,[4] regardless of whether the state holds formal title.[5] Appendix A at 17 ("[b]oth types of submerged lands are normally subject to a public trust easement.") (citing *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981)). On such lands, the public trust "is in the nature of an easement that preserves for the public the 'rights of fishing and navigation.'" Appendix A at 16 (quoting *Opinion of the Justices*, 437 A.2d at 605. Maine's public trust doctrine is similar in scope to the doctrine recognized by other states. *See, e.g., Orion Corp. v. State of Washington*, 747 P.2d 1062, 1071-73 (Wash. 1987).

As articulated in this Court's precedent, the public trust doctrine applies only to the states and only with respect to some of the states' dealings with private parties; there is no federal public trust doctrine that constrains the ability of the federal government to acquire, or convey, all interests in submerged lands. *Alabama*, 347 U.S. at 273-74 (rejecting notion that the

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[4] Although *Illinois Central* established a baseline for the public trust doctrine, this Court has made clear that the states may further define the lands and waters to which the public trust doctrine applies. *Phillip Petroleum Co.*, 484 U.S. at 794-95.

[5] Departing from *Shively*, Maine initially refused to claim full title to submerged "intertidal" lands; i.e, lands between the high and low water mark. Appendix A at 17. In 1953, the United States explicitly granted the state title to all submerged lands below the low water mark, while reserving a right to use the lands for military purposes and excepting any property that had previously been taken by the government. 43 U.S.C.A. §§ 1301-15 (West 1986).

United States holds submerged lands in trust for the states); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984) (noting that the Supreme Court has never stated whether the public trust doctrine applies to the federal government).

B. The Decision Below Clouds Federal Title by Adopting a Narrow View of Federal Condemnation Power, in Conflict with This Court's Precedent and the Decisions of Other Lower Courts

In the decision below, the Maine Supreme Court held that the United States failed to acquire the submerged lands and waters here free of the state's "public trust" easement when it formally condemned "all right, title and interest," and then occupied the area for exclusive military use. Appendix A at 18-19. The lower court reasoned that the state's public trust interest survived "because the description of the property [in the declaration of taking] does not include any mention of the public trust easement of the State." *Id.* at A-18. It was not enough that the federal government listed the state as a party to the taking and then occupied the submerged lands; to effect a taking of the state's public trust interests, the federal government was required to explicitly identify and declare the state's public trust to be a condemned interest. *Id.* at A-19. In effect, this establishes a presumption that a state's sovereign interests in submerged lands are superior to the federal government's sovereign authority to obtain and control such lands for its own purposes. This view places a serious cloud on the title to federally owned or occupied submerged lands, and on lands previously conveyed by the federal government, and is irreconcilable with this Court's jurisprudence and the decisions of lower federal courts.

1. The Decision Clouds Federal Title to Submerged Lands

The lower court's decision has potentially far-reaching consequences for federally owned submerged lands because the United States generally has not expressly declared an intent to take the state's public trust interest when acquiring such lands. Instead, it has (as here) typically obtained the lands by declaring an intent to take the fee interest and/or by physically occupying the land. *See, e.g., United States v. 11.037 Acres of Land*, 685 F. Supp. 214, 215 (N.D. Ca. 1988) (fee interest); *422,978 Square Feet of Land*, 445 F.2d at 1181 (physical occupation). Yet, according to the decision below, this traditional procedure leaves the state's public trust easement intact as a matter of federal law. Appendix A at 18, 19. If so, public trust rights also remain intact. *See, e.g, City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1450 (N.D. Ca. 1986) ("By condemnation, the United States simply acquires the land subject to the public trust as though no party had held an interest in the land before."). Therefore, the ultimate, logical result of the decision below is that submerged lands under federal control are subject to a state public trust law easement if the lands were acquired without express condemnation of the public trust.

The possibility that the United States' lands are subject to a state public trust easement raises significant and obvious concerns for the federal government, not the least of which is the potential disruption of coastal military installations and exercises. *See generally*, Major Richard M. Lattimer, Jr., *Myopic Federalism: The Public Trust Doctrine and Regulation of Military Activities*, 150 Mil. L. Rev. 79, 103-06 (1995) (discussing potential effect of applying public trust to coastal military activities). After all, if military occupation and control was not enough to terminate Maine's public trust easement on the tidal lands here, then other similar lands, such as the lands

of Portsmouth Naval Shipyard,[6] may be subject to the easement under a literal interpretation of the decision below.

Indeed, because the lower court's application of the public trust easement flows from a construction of federal law—the Declaration of Taking Act—its decision logically applies to federal lands throughout the nation that were acquired without express declaration of an intent to condemn a state's public trust easement. *See, e.g., United States v. 1,010.8 Acres, More or Less, Situate in Sussex County, Del.*, 56 F. Supp. 120 (Del. 1944) (submerged lands and waters taken from Delaware in fee simple by the United States for military use); *United States v. 36.46 Acres of Upland and 118.76 Acres of Land Underwater, More or Less, in the Borough of Staten Island*, 113 F.R.D. 124 (E.D.N.Y. 1986) (United States takes a fee interest in submerged lands in and around New York City for a naval base); *United States v. 49.79 Acres of Land, More or Less, Situate in New Castle County*, 582 F. Supp. 368 (D. Del. 1983) (upholding condemnation of fee simple interest in submerged lands); *United States v. 10.08 Acres of Land, More or Less, in Jackson and West Manchester Townships*, 46 F. Supp. 138 (D. C. Pa. 1942) (same).

The decision below therefore provides a basis for states to claim that federal tidal lands occupied without express condemnation of the public trust are held subject to the state's public trust doctrine and the public interests protected by that doctrine.[7] This is not hyperbole; examples of such state claims

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[6] Portsmouth Naval Shipyard is located on an island in tidal waters within the state of Maine. *See generally, New Hampshire v. Maine*, 426 U.S. 363 (1976). Areas of the island's shoreline and adjacent waters are controlled by the federal government for purposes of submarine operations.

[7] The United States has waived its immunity to suit in actions brought against it to quiet title to land. 28 U.S.C. § 1346(f). *See* (continued...)

already exist. *See, e.g., State of California v. United States*, 512 F. Supp. 36, 36-38 (1981) (California claims that the United States holds donated portions of former air force base subject to the state's public trust); *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. at 1449-50 (State of California claims that the United States acquired submerged lands subject to the state's public trust law). The decision below provides substantial additional authority for renewed attempts by the states to condition and limit federal ownership of submerged lands.

Moreover, since many states recognize a private right of action to enforce the public trust, *see, e.g., Gillen v. City of Neenah*, 580 N.W.2d 628 (Wis. 1998), the decision below provides a basis for private parties to bring suit against the United States or its grantees in an attempt to impose public access. *See Feliciano v. United States*, 297 F. Supp. 1356 (D. Puerto Rico 1969) (individual sues United States, claiming that military's exclusive control of coastal waters violated his rights to access under state law); Lattimer, *supra, Regulation of Military Activities,* at 104 ("One of the most troublesome aspects of the public trust doctrine . . . is that it provides citizens with a vehicle to challenge military activities that affect public trust property.").

Thus, from the United States' view, the likely best result from the decision below is increased conflict between states, private parties, and the federal government:

> Lengthy negotiations and meetings with the myriad of state agencies . . . may not be the end of the road for military planners [faced with public trust claims]. Rather, they may find themselves faced with a court

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[7] (...continued)
California v. Arizona, 440 U.S. 59, 65-68 (1979).

> battle against citizens opposed to the proposed military activity and dissatisfied with the actions of state regulatory agencies.

Lattimer, *supra*, *Regulation of Military Activities*, at 104.

The likely worst result is a judicial ruling in favor of a state or private party requiring the military to modify its use of property to allow public access.

Neither federal property used for purposes as important as national defense, or the resources of the national government should be held hostage to a rigid interpretation of the condemnation power that subordinates federal sovereignty to the states' public trust authority. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534-35 (1941).

> Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield . . . . Nor can a state call a halt to the exercise of the eminent domain power of the federal government because . . . [it] interferes with the state's own program for water development and conservation . . . . That program must bow before the "superior power" of Congress.

Id. (Citations omitted).

In allowing Maine's public trust easement to survive federal condemnation and exclusive occupation of the lands here, the decision below bends the United States' eminent domain powers to the state's public trust authority, and thereby clouds federal title to submerged lands. This Court should take this case to clarify that, pursuant to its supreme sovereignty, the United States takes land free of a state public trust access easement without an express declaration of intent to terminate that easement.

2. The Decision Below Cannot Be Reconciled with This Court's Understanding of Federal Power

The decision below warrants review not only because of its destabilizing practical consequences, but also because it finds no support in this Court's jurisprudence. Although the state's public trust property interests are significant, they have always been subject to "the rights since surrendered by the constitution to the general [federal] government." *Illinois Central*, 146 U.S. at 456 (quoting *Martin v. Wadell*, 16 Pet. 367, 410 (1842)). Accordingly, when the United States exercises its rights of eminent domain with the intent and need to take all interest in submerged lands for exclusive federal use, the state's interests are deemed to be destroyed, regardless of whether that interest was specifically condemned. *Dow*, 357 U.S. at 22; *Duckett*, 266 U.S. at 151; *United States v. Coronado Beach Co.*, 255 U.S. 472, 489 (1921) (an intent to take a "whole" area including uplands and submerged lands is sufficient to take all interests in the submerged lands); *see also*, *Richland Irr. Dist. v. United States*, 222 F.2d 112, 114 (9th Cir. 1955) (when it declares an intent to take the fee, but makes no specific mention of appurtenant water rights, the federal government's declaration of taking still takes all appurtenant water rights).

The decision below effectively reverses this framework by holding that the default rule is that the states' public trust easement survives a complete federal taking and occupation of submerged lands. Put starkly, the decision below presumes that federal power is subject to the (public trust) rights surrendered to the states, in manifest opposition to the scheme recognized by this Court's precedent. This Court should take this case to clarify the functioning of the system of dual sovereignty as it operates with respect to ownership and control of submerged lands.

3. The Decision Below Highlights Confusion Among the Federal District Courts

In considering whether federal condemnation of a fee interest terminated the State's public trust easement, the court below was faced with contradictory federal precedent. Like the decision below, a few courts have approved a narrow understanding of federal power, one that leaves the state's public trust easement intact on federally condemned and occupied lands. *See United States v. 1.58 Acres of Land Situated in the City of Boston*, 523 F. Supp. 120, 125 (D. Mass. 1981); *Todd Shipyards*, 635 F. Supp. at 1450. Other courts have rejected this view, holding that a federal taking of a fee interest in submerged lands divests the state of any public trust interests in the land. *United States v. 11.037 Acres of Land*, 685 F. Supp. at 215.

The federal confusion traces to the decision in *1.58 Acres of Land*. There, the United States formally condemned the fee interest in waterfront land for use as a Coast Guard base. *Id.* at 121. The Declaration of Taking made no mention of the state's public trust easement. *Id.* Massachusetts then challenged the taking, denying "that the United States could obtain a fee simple absolute in such portions of the land described in the Declaration of Taking that lie below the low water mark" because of the state's public trust easement. *Id.* The federal court sided with the state. While agreeing that condemnation of a fee interest gave the federal government paramount rights in submerged lands, the court reasoned that this did not abdicate the public trust. *Id.* at 122, 124. Instead, the court concluded that the federal government merely took over responsibility for administering the public trust easement. *Id.* at 124-25. According to the court, "neither the [state's] nor the federal government's trust responsibilities are destroyed by virtue of this taking." *Id.* at 125. This decision was later followed in *Todd Shipyards*, 635 F. Supp. at 1450.

The holding of the *1.58 Acres of Land* decision was squarely rejected in *United States v. 11.037 Acres of Land*, 685 F. Supp. 214. There, the United States attempted to condemn submerged lands impressed by California's public trust doctrine. *Id.* at 214-15. The condemnation was effected pursuant to a declaration of intent to take a fee simple interest. *Id.* at 215. The State of California resisted the taking on the ground that "the United States . . . may only take [the lands] subject to the public trust easement of the State." *Id.* The federal court for the Northern District of California rejected California's claim, holding that because "the United States' power of eminent domain is supreme to the State's power to maintain tidal lands for the public trust, the Court concludes that the United States' condemnation of these lands extinguishes the State's public trust easement." *Id.* at 216. The federal government's taking of a fee simple interest in public trust-impressed lands was therefore sufficient to terminate the public easement. *Id.* at 216-17. In reaching this decision, the court expressly acknowledged that it was putting itself in conflict with the Massachusetts' court's decision in *1.58 Acres of Land*, stating: "Because this Court believes it is bound by the Supremacy Clause of the United States Constitution to hold otherwise . . . it respectfully declines to follow [the *1.58 Acres of Land*] ruling." *Id.* at 217.

There is, then, no federal consensus on the issue of whether the federal government's powers are superior to the state's public trust interest so that a federal taking terminates the state's interests and vests absolute ownership, including the right to exclude the public, in the United States. In holding that federal occupation of tidal lands is presumed to be encumbered by the states' public trust interest, the decision below highlights the confused state of the law on a question directly impacting the sovereign powers of the national and state governments. The law should not be left unsettled on such an important issue; this Court should review this case to bring clarity and

uniformity on the issue of the federal government's power to take and occupy lands traditionally subject to the state's public trust easement.

II

WHETHER A STATE CAN REASSERT A PUBLIC TRUST EASEMENT WHEN THE FEDERAL GOVERNMENT CONVEYS SUBMERGED LANDS TO A PRIVATE PARTY, AND SO DENY THE OWNER'S RIGHT TO EXCLUDE OTHERS WITHOUT JUST COMPENSATION, IS AN IMPORTANT ISSUE OF LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT

If the lower court was wrong, and the United States' condemnation and occupation of submerged lands in fact extinguishes a state's public trust easement, the decision below raises an important issue as to whether a state may reassert the easement, and deny the owner's right to exclude the public without compensation, when the federal government conveys the lands to a private party.

A. The Right to Exclude Issue

As this Court has repeatedly noted, the right to exclude others from private property is "universally held to be a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). In Justice Brandeis' words, the right to exclude is the "essential element" of the right to own property. *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting); *see also*, *United States v. Karo*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring) ("The owner of property, of course, has a right to exclude from it all the world, including the Government."). Because of the importance of the right to exclude, this Court has recognized that a government-

authorized invasion of private property automatically gives rise to a claim for just compensation under the federal Takings Clause. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982). This is true even if the invasion is for intermittent public access. *See Kaiser Aetna*, 444 U.S. at 180-81; *see also, Nollan v. California Coastal Commission*, 483 U.S. 825, 832 (1987) ("[A] 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro.").

In this case, the lower court held that Mr. Norton has no right to stop the public from accessing his submerged property for purposes of fishing and mooring, and therefore no right of compensation for that invasion, because the intrusion is authorized by the state's public trust easement. If the prior federal occupation extinguished the easement, this conclusion means the state may suddenly reassert its easement on lands physically susceptible to the public trust, without compensation, at any time after the United States conveys the lands to a private party. Indeed, this is the very argument made by the Town and State. *See* Appendix at B-4 (Defendants [Town and state] argue that "a conveyance would resubject the submerged lands to the public trust.").

Such a broad understanding of the public trust doctrine cannot be reconciled with this Court's respect for the Fifth Amendment protections afforded the right to exclude others from private property. *See Kaiser Aetna*, 444 U.S. at 172-80; *see also, Opinion of the Justices*, 649 A.2d 604, 611 (N.H. 1994) (relying on *Nollan* to hold that a law imposing a new public trust easement across private beach lands would cause a taking by eviscerating the right to exclude); *Opinion of the Justices*, 313 N.E.2d 561, 568 (Mass. 1974) (a law establishing a public trust easement on private beach land subject to the highest reach of the waves would cause a taking under the federal constitution due to interference with the right to exclude others).

A decision allowing the states to suddenly impose an uncompensated public trust easement is in particular tension with this Court's decision in *Kaiser Aetna*. There, the owners of a private pond sought permission from the federal government to dredge a channel that would connect the pond to the sea. 444 U.S. at 167. After the channel was completed, the government asserted that the waters were now subject to a federal navigational servitude which required public access to the waters. *Id.* at 168.

When the owners claimed that the federal government's authorization of a public invasion amounted to an uncompensated taking of property, this Court agreed. In so doing, the Court emphasized that the property right at stake, the right to exclude, was so fundamental that interference with the right would normally be considered a physical occupation that results in a per se taking. *Id.* at 179-80. Significantly, the Court rejected the government's argument it could not incur takings liability because it was acting under its long-standing navigational servitude powers. *Id.* at 172-73. While recognizing that the property at issue was in a condition that might subject it to the navigational servitude, the Court held this was not a defense to a taking claim premised on a new imposition of a public access easement. *Id.* at 178-80. On the contrary, use of the servitude in this way rose to the level of a taking because:

> This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.

Id. at 180.

Kaiser Aetna logically denies the states the ability to escape takings liability for interfering with the right to exclude merely because they invoke a traditional power to enforce the public trust doctrine. If the property owner's predecessor in interest held the property free of an easement, a state cannot impose that easement without compensation simply because the property may be geographically susceptible to public trust authority. *Summa Corp. v. California ex rel. State Lands Comm.*, 466 U.S. 198 (1984) (state could not assert a public trust easement against a private party whose predecessors acquired and held submerged lands with an assertion of that easement). Instead, the fundamental nature of the right to exclude bars states from newly asserting public access on lands that are physically amenable to the public trust doctrine, but traditionally in exclusive private use, just as it precludes a new and uncompensated easement on waters susceptible to the federal navigational servitude. *See, e.g, Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart J., concurring) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property . . . by the simple device of asserting retroactively that the property it has taken has never existed at all.").

This Court should take this case to make clear that the state's sovereign power to regulate under the public trust is no more capable of abridging the fundamental right to exclude without just compensation than the federal government's sovereign power to regulate navigation.

B. Courts Are in Conflict on Whether the Public Trust Doctrine Can Justify a Sudden and Uncompensated Public Easement

The scope of the states' authority to circumscribe private property rights under the public trust doctrine is a subject of intense scrutiny and controversy. *Compare* Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to*

Environmentalists and Policy Makers, 10 Fordham Envtl. L. J. 1 (1998) (arguing that expansive applications of public trust authority conflict with property rights as protected by the Federal Takings Clause) with Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 Vt. L. Rev. 81, 83 (1995) (arguing that "when the state acts pursuant to the public trust doctrine and limits the use of private property, no 'taking' will occur."). The controversy has engulfed state and federal courts, as well as scholars, generating a particular conflict among the courts on whether the states can constitutionally enforce an uncompensated public trust easement on private property that has traditionally been put to exclusive private use, but which remains useful for public trust purposes.

Many courts have held that a sudden expansion or application of a public trust easement in derogation of an owner's expectation of a right to exclude others would violate the Takings Clause, if not accompanied by just compensation. *See, e.g., Opinion of the Justices*, 649 A.2d at 611 (a new law imposing a public trust easement across private beach lands would cause a taking); *Opinion of the Justices*, 313 N.E.2d at 568 (a new law establishing a public trust easement on private beach land subject to the highest reach of the waves would cause a taking); *Purdie v. Attorney General*, 732 A.2d 442, 447 (N.H. 1999) (a law newly imposing an easement on private beaches above the high water mark would cause a taking); *Douglaston Manor, Inc. v. Bahrakis*, 89 N.Y. 2d 472, 483 (N.Y. 1997) (refusing to impose public trust easement over nonnavigable waters historically in exclusive private use due to impact on property rights).

Other courts have adopted a more expansive view of the states' public trust powers, holding that the state can suddenly impose a public access easement without compensation on land useful for trust purposes, even though the private owners (and

predecessors) traditionally exercised the right to exclude others. *See, e.g, Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170-71 (Mont. 1984) (allowing uncompensated easement across private dry land and submerged lands to allow public use of waters subject to public trust); *National Association of Home Builders v. New Jersey Department of Environmental Protection*, 64 F. Supp. 2d 354, 359, n.2. (D. N.J. 1999) (state may require property owners to build and maintain a public walkway across filled land that was once submerged and subject to the public trust without causing a taking); *see also, Mathews v. Bay Head Improvement Assoc.*, 471 A.2d 355, 365-66 (N.J. 1984) (extending public trust to private, dry beach areas and barring owners from excluding the public from these areas).

In this case, the lower court held that Mr. Norton's "small boat pool" was subject to public access under the State's public trust doctrine, without compensation, despite the fact that Norton's predecessor—the federal government—acquired all interest in the property without objection from the state, fully exercised the right to exclude, and then transferred title to Mr. Norton, who also proceeded to exclusively use the property for years. In so doing, the Maine court has sided with those courts viewing the public trust as a broad source of state power to redefine traditional property rights without violating the Takings Clause, putting itself in conflict with the many other courts recognizing that an assertion of public trust access disrupting settled expectations of exclusive use requires just compensation. This Court should grant the Petition to resolve the conflict among the courts as to the point at which the states' public trust doctrine crosses the line between a permissible exercise of state sovereignty and an infringement of fundamental and constitutionally protected private property rights.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: February, 2006.

Respectfully submitted,

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Appendix A1

Docket No. Cum-04-626

SUPREME JUDICIAL COURT OF MAINE

JOHN S. NORTON Jr.	)	Argued:
	)	May 17, 2005
Plaintiff,	)	Decided:
	)	Oct. 11, 2005
v.	)	
	)	
TOWN OF LONG ISLAND, et al.	)	
	)	
	)	
Defendants,	)	

* * * *

Panel: SAUFLEY, C.J., and CLIFFORD, DANA, ALEXANDER, CALKINS, and LEVY, JJ.[1]

SAUFLEY, C.J.

John S. Norton Jr. appeals from the dismissal by the Superior Court (Cumberland County, Crowley, J.) of his claim against the Town of Long Island to quiet title to two roads that run through his property and from its declaration in his quiet title claim against the State of Maine and the Town of Long Island that he lacks any ownership interest in the submerged land known as a "small boat pool," which is located in Casco Bay adjacent to his Long Island property. Norton argues that the doctrine of res judicata does not bar his claim to quiet title to the roads and that the United States government had the

[1] Justice Paul L. Rudman sat at oral argument and participated in the initial conference, but retired before this opinion was certified.

authority to convey to him the submerged land comprising the small boat pool free of any public trust. We conclude, as did the Superior Court, that Norton's predecessor in interest took the small boat pool subject to the public trust held by the State, but we agree with Norton that the doctrine of res judicata does not bar his claim to quiet title to the roads. Accordingly, we affirm the judgment in part and vacate in part.

I. BACKGROUND

The present dispute arises from the federal government's conveyance to John S. Norton Sr. of property obtained by the United States Navy through condemnation in the 1940s. At that time, preparatory to World War II, the United States government acquired by condemnation certain property on Long Island where it constructed and operated a Naval fuel annex. One of the piers within this property, known as Pier H, extended from the land into Casco Bay. Adjacent to Pier H was an angled breakwater. These structures, along with one or more wooden docks or other wooden structures enclosed an area known as a small boat pool. While the Navy had possession of the land, it guarded access to the small boat pool by sea and by land.

Through a 1942 order, the United States obtained possession of the land "described in the Petition for Condemnation." The petition described the land as being bound on the shore by the "ordinary high water mark of Casco Bay." The petition listed thirteen individual owners from whom the land was to be taken and indicated that "the City of Portland, the County of Cumberland and the State of Maine may have or claim to have some interest in and to said lands." The subsequent declaration of taking and the judgment on that

declaration[1] provided the same description of the boundary on the shore, but added that the property was to be taken in fee simple, "including the abutting rights in and to the boundary streets, riparian rights, and all right, title and interest in the adjacent submerged lands." The judgment on the declaration of taking does not list the parties from whom the land was taken. The final judgment as to the tracts taken, entered on April 6, 1945, stated that the United States obtained "full fee simple title (including, the abutting rights in and to the boundary streets, riparian rights, and all right, title and interest in the adjacent submerged lands. . .)." The parties listed in the judgment as having been compensated for the taking were four individuals, a community club, and the City of Portland.

After the war, the United States conveyed the land to John S. Norton Sr. and Peter K. Lannon by a 1964 quitclaim deed without covenant that described the boundary as being "along the [ordinary] high water mark of Casco Bay and along the shore line of Long Island." The United States also executed a quitclaim "confirmatory deed" without covenant in 1965; it was issued "to correct and confirm the deed of February 14, 1964 between the parties herein by including the exceptions and reservations. . . which exceptions and reservations were erroneously omitted from the original deed." The language describing the border along the shoreline was identical to the

[1] The judgment was entered by the United States District Court for the District of Maine (Peters, J.) on March 31, 1943.

language in the original deed.[2] The 1965 deed reserved to the United States and its assigns, however,

> for the benefit of its remaining land the right to use and maintain, in common with all others entitled thereto, for all purposes for which streets or ways are now or may hereafter be used in the City of Portland, Maine those ways known as Island Avenue and Marginal Street located within the above-described Parcel.

After purchasing the property from the United States, John S. Norton Sr. considered the small boat pool to be his exclusive property. Both he and his son exercised control over the property consistent with ownership, but neither the City of Portland nor the Town of Long Island acceded to the Nortons' ownership.

It was not until October 22, 1986, that John S. Norton Sr. and Mary L. Norton, as joint tenants, obtained a deed from the United States that stated, "It was the intent of the Grantor herein to convey the said Pier 'H' and breakwater in the aforesaid deed of May 28, 1965."

In April 1989, John S. Norton Sr. and Mary L. Norton obtained yet another deed from the United States that was "intended to clarify [the] two prior deeds" from 1965 and 1986. The deed granted all interests described in the prior deeds "and consisting of submerged land adjacent to a parcel of property and bulkhead, said property formerly being a part of the U.S. Naval Fuel Annex situated on Long Island."

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[2] The deed describes the border as being "along the [ordinary] high water mark of Casco Bay and along the shore line of Long Island."

In 1988, John S. Norton Sr. commenced an action in the United States District Court for the District of Maine alleging that the City of Portland (which at the time contained Long Island) had violated his Fourteenth Amendment rights by using the roads for travel and parking, and by encouraging others to do so. Upon the parties' cross motions for summary judgment, the United States Magistrate Judge (Cohen, M.J.) recommended that the City's motion be granted for multiple reasons. The magistrate concluded that Norton Sr. failed to plead a procedural due process claim properly, but further stated that, even if Norton Sr. had pleaded the claim properly, his remedy would be a post-deprivation remedy, such as bringing a quiet title action, not a pre-deprivation process. The magistrate specifically stated that Norton Sr. "could have brought a quiet title action," and that he could have minimized damages "had he pursued available state law remedies to clarify and enforce his rights when the parking first began to be a problem in July 1986." The magistrate also concluded that the complaint had pleaded substantive due process and equal protection claims, but that no violations existed based on the summary judgment record.

The United States District Court (Carter, J.), upon the recommendation of the magistrate judge, granted a summary judgment in favor of the City. The court concluded that Norton Sr. failed to establish a procedural due process remedy, could not therefore sustain a substantive due process claim, and could not succeed on his equal protection claim because the City had a rational basis for regarding the streets as public ways. The court further stated that the issues presented "depend[ed] upon the legal rights of the parties which are traditionally resolved under state law," and that "a healthy sense of federal-state comity dictates that the resolution of [the title] issues should be left to the state courts, which are better positioned to definitively adjudicate them." The court explicitly stated that the decision of the city manager to allow travel and parking was

"in no sense an adjudication of the status of Plaintiff's title to the real estate," and the city manager's "decision to leave [Norton Sr.] to the invocation of his legal rights and remedies was an option legitimately open to him." As a result, the decision of the city manager "cannot be taken to be a deprivation of any constitutionally secured right, immunity, or privilege of the Plaintiff."

In 1996, this time without the benefit of an attorney's assistance, Norton Sr. filed a nearly identical federal complaint against the Town of Long Island. Upon motion by the Town of Long Island, the United States District Court for the District of Maine (Hornby, J.) granted a summary judgment on the basis of res judicata and collateral estoppel because of the earlier federal claim.

In 2002, John S. Norton Sr. commenced the present action against the State of Maine and the Town of Long Island seeking to quiet title to the small boat pool and the portions of Island Avenue and Marginal Street that run through his property, which he contends are not public ways. As amended, Norton Sr.'s complaint alleged the following claims: quiet title to Island Avenue and Marginal Street against the Town (count one), quiet title to the submerged lands against the Town (count two), damages for the Town's alleged taking without just compensation (count three), and quiet title to the submerged lands against the State (count four).

Upon a motion by the Town, the court dismissed count one seeking to quiet title to the portions of Island Avenue and Marginal Street that ran through his property based on the doctrine of res judicata. The court reasoned that Norton Sr. should have prosecuted his quiet title action in conjunction with the 1988 federal court complaint he filed that alleged the

violation of his Fourteenth Amendment rights based on municipal encouragement of the public use of the two roads.[3]

Upon John S. Norton Sr.'s death, John S. Norton Jr. successfully moved to be substituted as the plaintiff in 2004. The remaining counts thereafter proceeded to a bench trial. The court issued a judgment in favor of the Town of Long Island and the State of Maine on all counts. Although the court concluded that the 1989 deed was not void and that the federal government had intentionally condemned the submerged lands during World War II, the court ultimately concluded that Norton did not own the submerged lands because the United States lacked the authority to convey the submerged lands to his father free from the State's public trust interest. The court clarified, on Norton's motion to alter or amend the judgment, that Norton does have title to the breakwater. Norton timely appealed.

II. DISCUSSION

A. Title to Island Avenue and Marginal Street

According to Norton, the earlier judgments left open his opportunity to bring claims in state court to quiet title to the relevant portions of Island Avenue and Marginal Street, and to establish damages. He contends that the United States District Court declined jurisdiction over the issue of title, thereby declining supplemental jurisdiction.

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[3] Following the dismissal of the count seeking to quiet title to the roads and the corresponding claim for damages, Norton Sr. appealed to this Court. We dismissed the appeal as an interlocutory appeal not subject to any exceptions to the final judgment rule. *Norton v. Town of Long Island*, 2003 ME 25, 816 A.2d 59.

The Town contends that the District Court would have asserted supplemental jurisdiction over Norton Sr.'s quiet title claim if he had pursued it in his initial federal proceeding because the federal claim and the current state claim share a "nucleus of operative facts." Further, the Town argues, the judgment did not indicate that it was entered without prejudice and did not contain any equivalent language.

We review a dismissal on the ground of res judicata de novo for errors of law. *Town of Boothbay v. Jenness*, 2003 ME 50, ¶ 19, 822 A.2d 1169, 1175.

Claim preclusion, which is the relevant component of the res judicata doctrine, "bars relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131, 139 (quotation marks omitted). The doctrine prevents a party from relitigating "issues that were tried, or that may have been tried, between the same parties or their privies in an earlier suit on the same cause of action." *Blance v. Alley*, 1997 ME 125, ¶ 4, 697 A.2d 828, 829 (quotation marks and emphasis omitted).

In determining whether a claim is precluded, we apply a transactional test, examining the "aggregate of connected operative facts that can be handled together conveniently for purposes of trial" to determine "if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong." *Draus v. Town of Houlton*, 1999 ME 51, ¶ 8, 726 A.2d 1257, 1260 (quotation marks omitted). In such circumstances, the newly pleaded claim is precluded even if the latest suit "'relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, or involves evidence

different from the evidence relevant to the first case.'" *Blance*, 1997 ME 125, ¶ 4, 697 A.2d at 829 (quoting *Petit v. Key Bancshares of Me., Inc.*, 635 A.2d 956, 959 (Me. 1993)); *see also Harriman v. Border Trust Co.*, 2004 ME 28, ¶ 5, 842 A.2d 1266, 1267. Claim preclusion does not, however, apply when a court "reserves a party's right to maintain a second action, as happens when a court dismisses a claim without prejudice." *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F.Supp. 2d 206, 213 (D. R.I. 2002).

The question, then, is whether either of the federal court actions could have resolved a quiet title action had Norton's father included such a claim in his complaints. "The federal district courts have the power to determine state law claims that arise from the common nucleus of operative facts that constitute the federal law claims." *Draus*, 1999 ME 51, ¶ 7, 726 A.2d at 1260. Arguments "that the federal court was not required to exercise its supplemental jurisdiction. . . have met with little sympathy." *Id.* ¶ 7 n.3, 726 A.2d at 1260.[4] If, however, it is

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[4] By statute, a federal court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C.A. § 1367(a) (West 1993). There are certain exceptions contained in the statute:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has

(continued...)

clear that the federal court would have declined to exercise supplemental jurisdiction in the earlier proceeding, the subsequent state claim is not precluded. Restatement (Second) of Judgments SS § 25 cmt. e (1982) (stating that, as between federal and state courts, if the court considering the first action would clearly have declined to exercise jurisdiction over a claim as a matter of discretion, the claim is not precluded in the second court); *see Waterville Indus., Inc. v. Fin. Auth. of Me.*, 2000 ME 138, ¶ 19, 758 A.2d 986, 991 (citing *First Interstate Bank v. Cent. Bank & Trust Co.*, 937 P.2d 855, 858 (Colo. Ct. App. 1996)).

We conclude that the federal court would have declined to exercise jurisdiction over a quiet title claim. The United States District Court articulated an intention that Norton Sr.'s title question remain a live issue for the State to address in the future: "the resolution of [the title] issues should be left to the state courts, which are better positioned to definitively adjudicate them." Because the District Court so strongly indicated that it would decline supplemental jurisdiction based on "a healthy sense of federal-state comity," we conclude that the matter presented for discussion here—the title to the roads—could not have been litigated in the federal proceeding and therefore the doctrine of res judicata does not bar Norton's claim to quiet title to the roads at issue. *See Waterville Indus., Inc.*, 2000 ME 138, ¶ 19, 758 A.2d at 991 (citing *First Interstate Bank*, 937 P.2d at 858); Restatement (Second) of

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[4] (...continued)
original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. § 1367(c).

Judgments § 25 cmt. e. Accordingly, we must vacate the court's dismissal of the claim to quiet title to the roadways (count one), and the corresponding claim for damages (count three) to the extent that those alleged damages arise from the facts alleged in count one.[5]

B. Interests in the Submerged Lands

In addressing Norton's claims to the submerged lands, we must first determine whether the court properly concluded that the federal government obtained title to the small boat pool through condemnation and conveyed title to the pool to Norton's father. Submerged lands are unique because of their usefulness to the public for fishing and navigation. *See Idaho v. United States*, 533 U.S. 262, 272, 121 S. Ct. 2135, 150 L. Ed.2d 326 (2001); Opinion of the Justices, 437 A.2d 597, 607 (Me.1981). Such lands are traditionally held by the State in trust for the public to use for fishing and navigation. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455-57, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

The present case presents a unique situation; the federal government took submerged lands from the State and from individuals. To effect a taking, the federal government was required to expressly describe the interest or interests taken.

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[5] Because the parties' respective property rights in the roads have not yet been considered by the Superior Court, we do not discuss or interpret the provisions in the federal government's deeds to John S. Norton Sr. that except and reserve to the United States "the right to use and maintain, *in common with all others entitled thereto*, for all purposes for which streets or ways are now or may hereafter be used in the City of Portland, Maine those ways known as Island Avenue and Marginal Street located within the . . . [p]arcel." (Emphasis added.)

Declaration of Taking Act, Pub. L. No. 71-736, ch. 307, 46 Stat. 1421 (1931) (codified as amended at 40 U.S.C.A. § 3114 (West 2005)). We must therefore apply the law in effect at the time of the taking to determine first, whether the federal government took title to the land and second, whether the property interests swept into the taking included the public's trust interest in the land. If the federal government did not take the State's public trust interest, we must determine whether Norton lacks a title interest in the land, or rather holds title, but lacks the ability to exclude the public from entering for purposes of fishing and navigation.

1. Whether the Federal Government Obtained and Conveyed Title to the Small Boat Pool

"[T]he plaintiff in a quiet title action has the burden of proving better title than that of the defendant." *Hodgdon v. Campbell*, 411 A.2d 667, 671 (Me. 1980). To accomplish this goal in the present case, Norton was required to establish a valid chain of title, including a valid taking by condemnation by the United States. The determination of property boundaries based on the language of a deed presents a question of law that we review de novo. *McGeechan v. Sherwood*, 2000 ME 188, ¶ 24, 760 A.2d 1068, 1075. If the language is ambiguous, the rules of construction apply and the court may examine extrinsic evidence. *Id.* In such circumstances, we review the trial court's findings regarding extrinsic evidence for clear error. *Thompson v. Rothman*, 2002 ME 39, ¶ 8, 791 A.2d 921, 924.

There is no question that the federal government may take property through condemnation proceedings. "[T]he United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings." *United States*

v. Dow, 357 U.S. 17, 21, 78 S. Ct. 1039, 2 L. Ed.2d 1109 (1958). In either instance, title passes to the United States when the owner receives compensation or when the United States deposits the compensation into court. *Id.* at 21-22, 78 S.Ct. 1039.

In the present case, the federal government employed a condemnation proceeding to obtain title to the land. At the time of the wartime condemnation in the present case, the United States government was operating pursuant to the Second War Powers Act of 1942, Public Law Number 77-507, ch. 199, § 201, 56 Stat. 176, 177 (repealed 1947), which granted the power to the Secretary of the Navy to

> acquire by purchase, donation, or other means of transfer, or [to] cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein . . . that shall be deemed necessary, for military, naval, or other war purposes. . . .

A separate Public Law made clear that the Secretary of the Navy was "authorized to establish or develop [certain] naval shore activities by the construction of such temporary or permanent public works as he may consider necessary." Act of Apr. 28, 1942, Pub. L. No. 77-531, ch. 250, 56 Stat. 248. The Declaration of Taking Act in effect at the time, Pub. L. No. 71-736, ch. 307, 46 Stat. 1421, required the filing of a declaration of taking that contained, among other things, a description of the land that was sufficient to identify it, a plan showing the land taken, and a statement of the amount estimated for just compensation. *Id.*

Most defects in a declaration of taking are not fatal to a taking pursuant to the Act. *See, e.g., United States v. 125.2*

Acres of Land, 732 F.2d 239, 242-43 (1st Cir. 1984) (stating that personal notice is not required for a taking to be effective and that takings in advance of compensation do not violate due process); *United States v. Haddon*, 550 F.2d 677, 680-81 (1st Cir. 1977) (stating that a failure of notice does not void the United States' taking, but may give rise to a claim for damages); *Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 914 (8th Cir. 2001) (same). A condemnation may be held to be void, however, if the condemnation court never obtained in rem jurisdiction because of an inaccurate or misleading description and a failure to seize the land. *United States v. Chatham*, 323 F.2d 95, 100 (4th Cir. 1963). "It would be establishing a dangerous precedent to permit the Government in a condemnation proceeding, which is purely statutory and strictly construed, to condemn one's property without clearly and unmistakably describing all of that portion sought to be condemned. . . ." *United States v. 5.324 Acres of Land*, 79 F.Supp. 748, 762 (S.D. Cal. 1948).

In the present case, the declaration of taking described the condemnation of the upland property and "adjacent submerged lands." This description is ambiguous because it does not describe the boundaries of the submerged land or explicitly address the public trust interest also at issue here. When interpreting documents that are ambiguous, it is appropriate to examine extrinsic evidence; we review the factual findings regarding the extrinsic evidence for clear error. *McGeechan*, 2000 ME 188, ¶ 24, 760 A.2d at 1075; *Thompson*, 2002 ME 39, ¶ 8, 791 A.2d at 924.

The trial court found that the evidence presented established the United States' occupation of the small boat pool and demonstrated its intention to take it. Specifically, the court found that the small boat pool, set off by Pier H and the breakwater, was guarded and regulated exclusively by the Navy. The trial record amply supports the court's factual finding that,

in addition to the language of the condemnation documents, "the federal government's occupation of the submerged lands evidences its intention to take the lands." *See Thompson*, 2002 ME 39, ¶ 8, 791 A.2d at 924. In sum, in light of the Navy's overt sequestration and use of the submerged land, the description of the property to include "adjacent submerged lands" cannot be regarded as inaccurate or misleading and hence does not run afoul of the Declaration of Taking Act, Pub. L. No. 71-736, ch. 307, 46 Stat. 1421, in effect at the time of the taking. *Compare with Chatham*, 323 F.2d at 100; *United States v. 5.324 Acres of Land*, 79 F.Supp. at 762.

Accordingly, the United States did obtain title to the small boat pool through condemnation and could convey it to Norton's father. Through its initial deed and the series of confirmatory deeds that followed, the federal government accomplished this land transfer. Ultimately, however, because Norton, through the present action, seeks to exclude the public from his property, we must also address whether the State's public trust easement in the small boat pool survived the condemnation and subsequent transfer of these submerged lands.

2. Whether Title to the Submerged Lands is Subject to the State's Public Trust Easement

As we have observed, at the time of the taking, the United States had the power to obtain interests in real property by condemnation and to construct public works as necessary. *See* Act of Apr. 28, 1942, Pub. L. No. 77-531, ch. 250, 56 Stat. 248; Second War Powers Act of 1942, Pub. L. No. 77-507, ch. 199, § 201, 56 Stat. at 177; Declaration of Taking Act, Pub. L. No. 71-736, ch. 307, 46 Stat. 1421. We must determine whether the federal government achieved the separate taking of the State's public trust interest in the small boat pool.

Because navigable waters are of great importance to the public, ownership of the submerged lands underlying those waters is "'strongly identified with the sovereign power of government.'" *Idaho v. United States*, 533 U.S. at 272, 121 S. Ct. 2135 (quoting *Montana v. United States*, 450 U.S. 544, 552, 101 S. Ct. 1245, 67 L. Ed.2d 493 (1981)); *see also Ill. Cent. R.R. Co.*, 146 U.S. at 455-56, 13 S.Ct. 110. Historically, as the United States grew, it regarded newly obtained lands under navigable waters as being "'held for the ultimate benefit of future States.'" *Idaho v. United States*, 533 U.S. at 272, 121 S. Ct. 2135 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S. Ct. 197, 70 L. Ed. 465 (1926)).

For their part, the states have traditionally held these submerged lands in trust for the public. *Ill. Cent. R.R. Co.*, 146 U.S. at 455-56, 13 S. Ct. 110. Title to such lands could be divested to an individual, but would remain subject to the public trust. *Id.* at 456-58, 13 S. Ct. 110. In Maine, this public trust is in the nature of an easement that preserves for the public the "rights of fishing and navigation." *Opinion of the Justices*, 437 A.2d at 605. Accordingly, the State held two separate interests and could convey the jus privatum, or the private right to title, but that title was subject to the jus publicum, or the public right of fishing and navigation, unless those rights were expressly limited or extinguished by the State. *See Opinion of the Justices*, 437 A.2d at 605-07; *see also United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124-25 (D. Mass.1981); *but see United States v. 11.037 Acres of Land*, 685 F. Supp. 214, 216-17 (N.D. Cal.1988) (declining to follow the reasoning of *1.58 Acres of Land* and holding that the public trust easement was extinguished by the federal taking).

The small boat pool at issue in the present case incorporates both the intertidal zone abutting Norton's land (i.e., the zone between the high tide and low tide marks) and

submerged lands beyond the intertidal zone.[6] Pursuant to Maine law, both types of submerged lands are normally subject to a public trust easement. *See Bell v. Town of Wells*, 510 A.2d 509, 514-16 (Me. 1986); *Opinion of the Justices*, 437 A.2d at 607 (stating that "intertidal and submerged lands are impressed with a public trust, a principle that reflects the unique public value of those lands"); *People v. Steeplechase Park Co.*, 218 N.Y. 459, 113 N.E. 521, 524 (1916) ("In this country the state has succeeded to all the rights of both crown and Parliament in the navigable waters and the soil under them. . . .").

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[6] Historically, state law has governed all title interest in the submerged lands within a state below the high tide mark, subject to the rights granted to the federal government by the Constitution. *See State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405, 407 (1912), and cases cited therein. Maine, unlike most states, permits private ownership of the zone between the high tide and low tide marks by the owners of abutting private lands, subject to a limited public easement. *Bell v. Town of Wells*, 510 A.2d 509, 514-15 (Me. 1986). This rule of law distinguishes Maine from other states, most of which vest title to the intertidal zone in the state. *See Shively v. Bowlby*, 152 U.S. 1, 18-26, 14 S. Ct. 548, 38 L. Ed. 331 (1894); *see also* Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 Alb. L. Rev. 623, 635 (1998). We later clarified the limited nature of that public trust easement, thereby restricting the range of the public's use of intertidal lands. *See Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989) (rejecting a general recreational easement for the public); *see also Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 95 (Me. 1996) (discussing the rights of riparian property owners, subject to the public trust easement). After World War II, Congress adopted the Submerged Lands Act of 1953, the relevant portions of which granted title to the states in the land beneath their navigable waters, preserving some rights in the federal government to use the submerged lands as necessary to secure the national defense. 43 U.S.C.A. §§ 1301-1315 (West 1986).

When the government commenced its condemnation proceeding to take the small boat pool, the Declaration of Taking Act, Pub. L. No. 71-736, ch. 307, 46 Stat. 1421, governed the process by which a taking could be achieved through condemnation. Although in general, the United States' exercise of eminent domain creates "a new title and extinguishes all previous rights," *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216 (1924), the United States may not take a state's interest in a condemned parcel except by stating so expressly in the condemnation proceeding, *see* Declaration of Taking Act, Pub. L. No. 71-736, ch. 307, 46 Stat. 1421 (requiring "[a] statement of the. . . interest in said lands taken") (codified as amended at 40 U.S.C.A. § 3114(a)(3)); *see also United States v. Chatham*, 323 F.2d at 100 (stating that a condemnation is void if the description was inaccurate or misleading).

Because of the importance of the interest at issue, the United States' taking of the jus privatum through a condemnation of land cannot be understood to implicitly include a taking of a state's public trust interest in that land. *Cf. City of Alameda v. Todd Shipyards Corp.*, 635 F.Supp. 1447, 1450 (N.D. Cal. 1986); *see also Opinion of the Justices*, 437 A.2d at 607. Here, because the description of the property does not include any mention of the public trust easement of the State, we will not imply a reference to that interest, and accordingly, we conclude the United States did not "take" the public trust easement and therefore never extinguished it by transferring it to a private individual.[7]

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[7] Because we conclude that the federal government did not intend to, or succeed in any effort to, condemn the public trust, we need not determine, as other courts have, whether the government could extinguish the trust. *Compare United States v. 11.037 Acres of Land*, 685 F.Supp. 214, 216-17 (N.D.Cal.1988) (holding, pursuant to the

(continued...)

The State was appropriately listed as a party to the condemnation proceeding because it held the jus privatum title to the submerged lands beyond the low tide mark until the taking. The inclusion of the State as a party did not, however, negate the requirement that the federal government be explicit about the nature of its taking. We will not read into the description an intention to take the easement held by the State for the public. Accordingly, although the United States exercised its powers pursuant to the Property Clause of the United States Constitution, U.S. Const., art. IV, § 3, cl. 2,[8] in deeding the land to Norton's father, the jus privatum interest it deeded remains subject to the State's public trust easement, the jus publicum, which allows the public to use the submerged lands for fishing and navigation.

Through the application of the public trust doctrine in the present case, we have determined that Norton's title is subject to the State's public trust easement. This determination does not disrupt the chain of title established by Norton at trial. Norton holds title to the small boat pool, but his title is subject

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[7] (...continued)
Supremacy Clause of the United States Constitution, that the federal government may extinguish a state's public trust easement by exercising eminent domain), with City of Alameda v. Todd Shipyards Corp., 635 F. Supp. 1447, 1450 (N.D. Cal. 1986) (holding that although the federal government may take the jus publicum, it may not permanently extinguish it and may not transfer it to a private party), and *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass.1981) (holding that neither the state nor the federal government may convey land below the low water mark to individuals free of the jus publicum because such a trust may only be held by the sovereign).

[8] "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, § 3, cl. 2.

to the State's public trust easement permitting the public to use the small boat pool for fishing and navigation.[9] Accordingly, Norton may, as the holder of title to the submerged lands, limit access to his structures, but may not build or arrange them in a manner that unreasonably interferes with the public's right to fish and navigate in the waters. *See Opinion of the Justices*, 437 A.2d at 605; *State v. Wilson*, 42 Me. 9, 26-27 (1856). The parties do not dispute that Norton has title to the breakwater structure itself and possesses the right to exclude others from it.

Because the judgment at issue articulated the State's public trust easement in the small boat pool as preventing Norton from having title to the pool, we clarify the judgment and remand for the entry of a judgment on count four quieting title in Norton, subject to the State's public trust easement.

The entry is:

Dismissal of count one (quiet title to Island Avenue and Marginal Street) vacated and remanded for further proceedings. Judgment on count two (quiet title to the small boat pool against the Town of Long Island) affirmed.

Judgment on count three vacated as to any claim for damages arising from count one, but otherwise affirmed.

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[9] The public trust easement prevents Norton from excluding members of the public who wish to navigate or fish within the small boat pool. We have defined this easement over the course of years to include the right of members of the public to sail over the lands, " 'moor their craft upon them,' " and "'fish in the water over them.'" *Bell*, 557 A.2d at 174 (quoting *Marshall v. Walker*, 93 Me. 532, 536-37, 45 A. 497, 498 (1900)). In addition, the public trust restricts a landowner from "fill[ing] or build[ing] so as unreasonably to interfere with the public rights of navigation." *Opinion of the Justices*, 437 A.2d 597, 605 (Me. 1981).

Appendix A21

Judgment on count four vacated and remanded for entry of a judgment quieting title to the small boat pool in Norton, but subject to Maine's public trust easement.

Me., 2005.
Norton v. Town of Long Island
883 A.2d 889, 2005 ME 109

Appendix B1

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-02-014

JOHN NORTON, JR. as Personal Representative of the Estate of John Norton, Sr.

Plaintiff

v.

DECISION

TOWN OF LONG ISLAND and STATE OF MAINE,

Defendants

BACKGROUND

The plaintiff, John Norton, Jr. is the personal representative of the Estate of John Norton, Sr., deceased. The defendants are the State of Maine and the Town of Long Island, which was formerly a part of the City of Portland and is situated in Casco Bay, Cumberland County, Maine. The plaintiff, in his Second Amended Complaint, seeks to quiet title to Island Avenue and Marginal Way against defendant Town of Long Island (Count I). In Count II of the complaint the plaintiff seeks to quiet title against defendant Town of Long Island to submerged lands adjacent to the uplands ("submerged lands"), which were acquired by deed from the United States of America acting through the General Service Administrator. Count III seeks damages caused by the defendant Town of Long Island and claims unjust enrichment. Count IV seeks to quiet title to "submerged lands" against the defendant State of Maine and seeks injunctive relief against both defendants.

Count I was dismissed by the court on *res judicata* grounds on July 2, 2002. A jury-waived trial was held on Counts II, III and IV on July 20 and 21, 2004.

FINDINGS OF FACT

In the 1940's, as part of the World War II war effort, the United States Navy constructed and operated a Naval Fuel Annex on a parcel of land on Long Island in Casco Bay. This facility was served by a structure that extended into the adjacent waters of Casco Bay and included Pier "H" which extended seaward from upland acquired by the United States Government by condemnation and later conveyed to the plaintiff's decedent. From the seaward end of Pier H an additional dock supported on pilings extended farther seaward. One or more wooden structures were built on or adjacent to this dock, and filling submerged land created an angled breakwater. The breakwater was attached to the seaward end of the extended dock. Together, the breakwater, dock and Pier H partially enclosed an area of Casco Bay and provided protection from the seas of Casco Bay. This partially enclosed area was referred to as the "Small Boat Pool." It is the Small Boat Pool and submerged land beneath it which is the principal subject of this case.

From the time of its construction and throughout the time that the property was operated as a Navy installation, the Small Boat Pool was not accessible by land because the upland Navy facility was fenced and guarded and access to the Small Boat Pool by sea was completely and exclusively regulated by the Navy.

From at least the early 1970's to his death, John Norton, Sr. considered the Small Boat Pool to be his property, and he and John Norton, Jr. exercised control over the pool consistent with their claim of exclusive ownership. They allowed certain boats to moor in the pool and excluded others. There is no

evidence that the City of Portland or the Town of Long Island ever acceded to the Nortons' claim of ownership.

The plaintiff's claims to the submerged lands are based upon four deeds from the United States of America acting by and through the Administrator of General Services. The first deed, to John S. Norton and Peter K. Lawson, is a quitclaim deed without covenant dated February 14, 1964 and recorded in the Cumberland County Registry of Deeds in Book 2805 Page 421. See Ex. 52. That deed conveys upland on Long Island and is bounded on the north by the high water mark of Casco Bay. See id. The deed recites that the conveyance "contain[s] 5.6 acres of land, more or less" and is "a portion of the land acquired by the United States of America on March 30, 1943 by condemnation proceedings entitled 'United States of America vs. 5.98 acres, more or less, located on Long Island, Portland, Cumberland County, State of Maine . . ." See id. at 2-3.

The second deed, dated May 28, 1965, is also a quitclaim deed without covenant from the United States to John S. Norton and Peter K. Lawson. See Ex. 54. The deed recites "the purpose of this deed is to correct and confirm the deed of February 14, 1964 between the parties herein by including the exceptions and reservations . . . which were erroneously omitted from the original deed." See id. at 3.

The third deed is a quitclaim deed without covenant, dated October 22, 1986, from the United States to John S. Norton and Mary L. Norton as joint tenants. See Ex. 59. The property conveyed is "Pier 'H' and a certain breakwater attached or adjacent thereto, said property formerly being a part of the U.S. Naval Fuel Annex situated on Long Island. . ." See id. at 1.

The fourth deed, dated April 18, 1989, is a quitclaim deed without covenant from the United States to John S. Norton and Mary L. Norton as joint tenants. See Ex. 67. That deed

conveys all of the grantor's "right, title and interest in and to the property described [in exhibits 52, 54 and 59] and consisting of submerged land adjacent to a parcel of property and bulkhead, said property formerly being a part of the U.S. Naval Fuel Annex situated on Long Island in the City of Portland and State of Maine." See id. at 1.

The defendants State of Maine and Town of Long Island oppose the plaintiff's claims on numerous grounds. First, they assert that the action is barred by the statute of limitations since the cause of action accrued when the first deed was delivered in 1964 and this action was commenced more than twenty years later.

Second, the defendants claim that the description in the only deed that mentions the submerged lands is inadequate and that the conveyance fails as a result. See Ex. 67.

Third, the defendants assert that the condemnation proceedings did not divest the State of Maine of the ownership of the submerged lands because the eminent domain procedure was fatally flawed, the United States never intended to condemn the submerged land, and the eminent domain proceedings only affected title to the intertidal zone adjacent to the bulkhead on the upland.

Finally, the defendants argue that the United States was powerless to convey the submerged land to private parties since such a conveyance would resubject the submerged land to the public trust.

Appendix B5

DISCUSSION

1. Is the Action Barred by the Statute of Limitations?

Maine's statute of limitations for real actions is twenty years. 14 M.R.S.A. § 801 (2003). The statute provides:

> No person shall commence any real or mixed action for the recovery of lands, or make an entry thereon, unless within 20 years after the right to do so first accrued, or unless within 20 years after he or those under whom he claims were seized or possessed of the premises, except as provided in this subchapter.

14 M.R.S.A. § 801.

The defendants argue that the statute of limitations in the present case began to run when John Norton, Sr. first acquired his alleged interest in the submerged lands in 1964. They assert that because the State of Maine has owned an interest in the submerged lands at least since the enactment of the Federal Submerged Lands Act of 1953, see 43 U.S.C.S. § § 1301-1315 (2004), and arguably since its statehood in 1820, the plaintiff's cause of action should have been brought no later than 1984. The court disagrees.

Until recently, there was no adverse activity that put plaintiff on notice that the defendants were asserting an interest in the submerged land. Because the defendants were not exercising or attempting to exercise control over the now disputed land at an earlier time, the plaintiff had no reason to bring a cause of action against them. Cf. Johnson v. Dedham, 490 A.2d 1187, 1189 (Me. 1985) (holding that the statute of limitations had not run on landowner's action brought to recover land town claimed under doctrine of adverse possession pursuant to tax liens, where town had exercised no acts of

possession over the land and where tax liens were invalid and thus could not operate to disseize landowner).

Accordingly, the plaintiff's action is not barred by the statute of limitations.

II. Does the Patent Ambiguity of the Language in the Fourth Deed Render the Deed Void?

The defendants assert that the language in the fourth deed contains a patent ambiguity that renders the deed void. See Ex. 67; see also Bradley v. Washington, Alexandria & Georgetown Steam Packet Co., 38 U.S. 89 (1839); Chadbourne v. Mason, 48 Me. 389 (1851); Sylvester v. Staples, 44 Me. 496 (1858); Nichols v. Frothingham, 45 Me. 220 (1858). The deed provides:

> That the UNITED STATES OF AMERICA . . . does hereby grant, remise, release and forever quitclaim unto JOHN S. NORTON AND MARY L. NORTON . . . all its right, title and interest in and to the property described [in exhibits 52, 54, and 59] and *consisting of submerged land adjacent to* a parcel of property and bulkhead, said property formerly being part of the U.S. Naval Fuel Annex situated on Long Island in the City of Portland and State of Maine . . . This deed is intended to clarify two prior deeds from the Grantor herein . . . It was the intent of the Grantor herein to convey its interest to the said submerged lands in the aforesaid deed of May 28, 1965, and this deed is intended as clarification and confirmation that Grantor's interest in the said submerged lands was conveyed by the Grantor herein in the aforesaid deed of May 28, 1965.

See Ex. 67 (emphasis added).

To satisfy the Statute of Frauds, the property description in a deed "must contain a sufficiently full and certain depiction of the land so as to afford a means of identifying the property which will distinguish it from all others." Richard Powell, 14 Powell on Real Property § 81A.05[1][c][i] (Wolf. ed. 2004).

Traditionally, it was impermissible to use parol evidence to explain patent ambiguities in deeds. See generally Bartlett v. Corliss, 63 Me. 287 (1873) (adopting the defendant's argument that "[p]atent ambiguities admit of no parol explanation; and latent ones only when they arise dehors the record"). More recently, however, the Law Court has suggested that whenever a deed is ambiguous (regardless of whether the ambiguity is latent or patent) the court may consider extrinsic evidence. See Jordan v. Shea, 2002 ME 36, ¶14,791 A.2d 116, 121.

The Law Court's recent election to focus on the question of whether any ambiguity exists in a deed, rather than distinguishing between patent and latent ambiguities, is illustrative of the approach taken by most courts today. See 14 Powell on Real Property § 81A.05[3][e]. ("The cases do not (or should not) state that if the ambiguity is patent, extrinsic evidence may not be introduced. Rather they generally state that if the ambiguity may be resolved within the document, there is no need for parol evidence. However, if it may not be resolved within the document, no matter how patent the ambiguity may be, extrinsic evidence may be introduced to help clarify the intent.") Maine, like most other states, appears to have abandoned the traditional canon of construction that "[e]xtrinsic evidence will be allowed to explain a latent ambiguity but a patent ambiguity must be resolved within the four corners of the deed." Id. (citing J. Cribbet, Principles of the Law of Property, at 169 (Foundation Press 2d ed. 1975).

Accordingly, the defendants' argument that the term "submerged lands adjacent to" renders the plaintiff's deed void on its face fails. Rather, the ambiguity in the terms of the deed allows the court to consider extrinsic evidence. See Eaton v. Town of Wells, 2000 ME 1676, ¶25, 760 A.2d 232, 242 (holding it proper for the court to examine extrinsic evidence where the deed is ambiguous and the intentions of the parties are in doubt). The extrinsic evidence before the court establishes that the federal government's deed adequately describes the submerged lands under and within the monuments erected around the Small Boat Pool.

III. Did the United States Intend to Condemn the Submerged Lands?

The defendants argue that the condemnation proceedings did not divest the State of Maine of the ownership of the submerged lands because (1) the eminent domain procedure was fatally flawed; (2) the United States never intended to condemn the submerged land; and (3) the eminent domain proceedings only affected title to the intertidal zone adjacent to the bulkhead on the upland.

A. Did the procedural flaws in the eminent domain proceeding prevent the federal government from condemning the submerged lands?

The defendants take the position that the 1964, 1965, and 1986 deeds from the United States to the plaintiff's predecessors never conveyed the submerged lands because they were never taken from the state in the condemnation proceeding. They argue this is so because: (1) the state did not receive the requisite notice that the submerged lands were being taken; and (2) the state was not paid for the condemned lands. The court rejects both arguments.

The Secretary of any United States military department has the authority to acquire lands for military or other war purposes. See 10 U.S.C.S. § 2663 (2004) (corresponding with 50 U.S.C.S. § 171 (1942)). In the case at bar, when the United States filed its Petition for Condemnation on November 27, 1942, it served the State of Maine and the State statutorily consented to the taking. This notice was sufficient to take all interest in the property. See A.W. Duckett & Co. v. United States, 266 U.S. 149, 151 (1924). Accordingly, it is inconsequential that the State may not have received specific notice that the federal government intended to take the submerged lands because the government's later occupation of the submerged lands[1] evidences its intention to take those lands. See United States v. Dow, 357 U.S. 17, 22 (1958) (holding that "[t]he usual rule is that if the United States has entered possession of the property prior to acquisition of title, it is the former event which constitutes the act of taking").

In addition, it is irrelevant that the State received no payment in the condemnation action for the submerged lands. The owner of lands under navigable waters does not have a right to compensation as against the United States. See United States v. Commodore Park, 324 U.S. 386, 390-92 (1945).

B. Did the Federal Government Intend to Condemn the Submerged Lands?

The defendants also argue that the federal government did not intend to condemn the submerged lands because: (1) no additional land was taken by the Declaration of Taking or the fourth deed; and (2) there was no need to take the submerged lands because the federal government already owned the

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[1] The federal government's occupation of the submerged lands was established at trial by the uncontroverted testimony of Ray Ladd.

submerged lands pursuant to the doctrine of navigational servitude.

i. Do the Declaration of Taking & the Fourth Deed Suggest that the United States did not Condemn the Submerged Lands?

The defendants assert that the 1964 and 1965 deeds from the United States to the plaintiff's predecessors purport to transfer the property that was described in the Declaration of Taking and other documents, not any property that was taken by possession. See Exs. 52, 54. In addition, they claim that the 1989 deed purports only to clarify the 1965 deed and therefore it cannot transfer any additional property. See Ex. 67.

The court disagrees with the defendants' conclusions. As discussed above, regardless of the amount of land described in the Declaration of Taking the federal government's occupation of the submerged lands evidences its intention to take the lands. See Ex. 97. Moreover, the 1943 Judgment on the Declaration of Taking, which expressly references the adjacent submerged lands, supports the court's conclusion. See Ex. 28, ¶ 3.

ii. Was it the United States' Intention Not to Condemn the Submerged Lands Because It Already Had the Right to Use Them Pursuant to the Doctrine of Navigational Servitude?

The defendants claim that the evidence suggests that the Small Boat Pool was being used for navigational purposes only and that occupation of the pool for navigational purposes did not vest title to real property in the United States or preserve the United States' ownership interest in the submerged lands following the enactment of the federal Submerged Lands Act. The court disagrees.

The fundamental public policy represented by the federal navigational servitude doctrine is keeping natural water highways open for public use. See 4 Waters and Water Rights, § 30.05, at 74 (Robert Beck ed., 4th ed. 1996). The federal government's exercise of dominion over the submerged lands exceeded its general power to navigate the waters, granted to it under the doctrine. According to the uncontroverted testimony of Ray Ladd, from the time of the construction of the Small Boat Pool and throughout the time that the property was operated as a Navy installation, it was fenced and guarded and access to the Small Boat Pool was completely and exclusively regulated by the Navy. The submerged lands were not kept open for public use. Hence, the defendants' assertion that the United States was using the submerged lands pursuant to the Doctrine of Navigational Servitude is unavailing.

C. Should the reference to "submerged lands adjacent to" be interpreted to mean intertidal zone?

Finally, the defendants assert that the term "submerged lands adjacent to" should be interpreted to mean "intertidal zone." The court finds the defendants' interpretation unreasonable given the literal meanings of both terms. Compare Webster's II New College Dictionary 1098 (2001) (defining "submerge" as: "1. To place under water. 2. To cover with water. 3. To hide from view.") with id. at 580 (defining "intertidal" as: "Of, relating to, or being the region between the extremes of high and low tide.") Further, in light of Ray Ladd's uncontroverted testimony that the federal government actually occupied submerged lands, the language in the deed cannot be read to refer to the intertidal zone.

IV. Did the United States Have the Authority to Convey the Submerged Land to Private Parties?

The defendants' final argument is that the United States did not have the authority to convey the submerged land to private parties because the lands were, and presently are, held in public trust. For the following reasons the court agrees.

"For centuries, land below the low water mark has been recognized as having a peculiar nature, subject to varying degrees of public demand for rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics." United States v. 1.58 Acres of Land, 523 F. Supp. 120, 122 (D. Mass. 1981) (citation omitted). Under common law,

> the rights to property were divided into two categories: a proprietary jus privatum, or ownership interest, and a governmental jus publicum, by which the king held the land in his representative capacity as representative of the people. The king could convey the jus privatum, but could not convey the jus publicum because this interest was held in trust for all the people.

Id. (citations and internal quotations omitted).

While our federal system of dual sovereignty has resulted in a number of modifications to the common law public trust, the present status of the public trust doctrine is explained in Illinois Central RR v. Illinois, 146 U.S. 387 (1892). Id. In Illinois Central, the Supreme Court held that the public trust interest may only be extinguished where the development of the land: (1) furthers one of the values within the scope of the public right, or (2) does not substantially impair the public use of the state sovereign resource, even though no public trust

value is advanced. Illinois Central, 146 U.S. at 453. Neither applies here.

In the case at bar, when the federal government took the submerged lands by eminent domain, it obtained the fullest fee that may be had in land subject to the public trust: the *jus privatum* and the federal government's paramount *jus publicum*. See 1.58 Acres of Land, 523 F. Supp. at 124. So restricted, neither Maine's nor the federal government's trust responsibilities were destroyed by the taking since neither government may destroy the trust unless the public trust has been extinguished. Id. at 125; see also City of Alameda v. Todd Shipyards Corp., 635 F. Supp. 1447, 1450 (N.D. Cal. 1986) (holding that "[t]he United States may not abdicate the role of trustee for the public when it acquires land by condemnation"). Although the federal government temporarily exercised exclusive domain over the submerged lands, it did not undertake any development of those lands that permanently extinguished Maine's public interest in the lands nor did it substantially impair the public use of the submerged lands. See Illinois Central at 453. Rather, the *jus publicum* was temporarily suppressed during a time of war. See U.S. Const. art. I, § 8 (granting Congress the power "to make Rules for the Government and Regulation of the land and naval forces"). Therefore, when the Navy ceased to use the property and the federal government conveyed the condemned property to a private individual, it conveyed the property subject to the public trust. See City of Alameda, 635 F. Supp. at 1450 ("The United States acquired sole trusteeship of the condemned portion of the land: If this portion was subject to the action of the tides at the time of condemnation, then the United States acquired this portion subject to the public trust, and the United States may not convey this portion to a private party.") (citing Illinois Central R. Co., 146 U.S. 387 (1892)).

This case can be distinguished from United States v. 11.037 Acres of Land, 685 F. Supp. 214 (N.D. Cal. 988) cited by the plaintiff in support of his argument that the public trust doctrine was extinguished in the taking. 11.037 Acres involved a dispute between the State of California and the federal government, as opposed to this dispute between the State of Maine and a private individual. See generally id. In addition, 11.037 Acres involved a dispute over filled tidelands, as opposed to this dispute over submerged waters. See generally id.

Further, although the plaintiff correctly asserts that a federal grant must be analyzed under federal law, see Bonelli Cattle Co. v. Arizona, et al., 414 U.S. 313, 319-20 (1973), the court's conclusion regarding the federal government's conveyance is consistent with the Law Court's holding in Opinion of the Justices, 437 A.2d 597 (Me. 1981). In Opinion of the Justices, the court expressed an opinion favorable to a bill to release the state's public trust in submerged and intertidal lands that were filled as of October 1, 1975. Id. at 607. However, the court also recognized that any legislation giving up public rights must satisfy a particularly demanding standard of reasonableness. Id. In its analysis the court considered: (1) the legitimacy and importance of clearing title so that commercial and other activity could go forward unimpaired by legal uncertainties; (2) the legislative finding that the lands in question had become substantially valueless for public trust purposes; (3) the legislative determination that the public trust interest in remaining submerged and intertidal lands was not impaired by the release; (4) the legislative finding that expectations had developed in the private parties who for long periods had relied on their title to filled land and in the municipalities who have taxed those lands; and (5) the fact that the release did not deprive the state of any of its broad regulatory authority over the lands in question. See id. at 607-09.

Applying the factors considered in Opinion of the Justices to the present case results in the retention of the *jus publicum*. First, although all parties agree that there is a need to clear title, either outcome will clear title and the need to clear title is not driven by the plaintiff's need to have commercial and/or other activity go forward. Second, the submerged lands have not become substantially valueless for public trust purposes; rather the public has specifically expressed an interest in mooring in the pool. Third, releasing the submerged lands to the plaintiff would impair the public trust because the plaintiff would be allowed to exercise control over the pool consistent with exclusive ownership. Fourth, although the plaintiff has claimed title to the lands for a long period of time, the ownership was pursuant to a quitclaim deed, and there is no evidence that the City of Portland or the Town of Long Island ever acceded to the plaintiff's ownership of the lands by taxing him on them. Finally, although the release of the lands to the plaintiff would still allow the state to exercise broad regulatory authority over the submerged lands, the state's authority would not be tantamount to the authority it would have over the lands if the *jus publicum* were retained.

DECISION

Based upon the foregoing, and pursuant to M.R. Civ. P. 79(a) the Clerk is directed to enter this decision on the Civil Docket by a notation incorporating it by reference and the entry is

Count I is dismissed with prejudice;

Judgment for the Defendant Town of Long Island on Count III;

On Counts II and IV, it is declared that the plaintiff has no interest in the submerged land known as the Small Boat

Pool, and that the same is owned by the State of Maine; and

Costs are allowed to the Defendants Town of Long Island and the State of Maine as prevailing parties.

Dated: August 2, 2004

Robert E. Crowley
Justice, Superior Court

Appendix C-1

STATE OF MAINE CUMBERLAND, ss.	SUPERIOR COURT CIVIL ACTION DOCKET NO. RE-02-014

JOHN NORTON

Plaintiff

v.

TOWN OF LONG ISLAND, and STATE OF MAINE

Defendants.

ORDER ON DEFENDANT TOWN OF LONG ISLAND'S MOTION FOR SUMMARY JUDGMENT ON COUNT III OF PLAINTIFF'S COMPLAINT

Before the court is the Town of Long Island's motion for summary judgment on Plaintiff's damages claim (Count III).

FACTUAL BACKGROUND

Plaintiff's complaint alleges the following: Plaintiff owns a 5.6 acre parcel of land with buildings and improvements located on Long Island ("the Norton property"). The Norton property was a portion of a Naval Fuel Annex of the United States Navy. The United States acquired the property during World War II through eminent domain proceedings resulting in a judgment entered March 31, 1943 by United States District Court Judge John A. Peters. The United States also obtained the State's interest in the submerged land adjacent to the Norton property in 1944, as reflected in a judgment entered on April 6, 1945.

After the war the Norton property was deeded to Plaintiff and Peter K. Lannon via quitclaim deeds from the General Services Administration ("GSA") dated February 14, 1964 and May 28, 1965. Mr. Lannon subsequently deeded his property to Plaintiff on September 5, 1967. On October 22, 1986, via a quitclaim deed, the United States conveyed to Plaintiff and Plaintiff's now deceased wife a pier in the submerged lands designated as "Pier H" and an adjacent breakwater, which were part of the Naval Fuel Annex. The Navy states in the 1986 deed that it had intended to convey the same in the 1964 and 1965 deeds. In addition, on April 18, 1989, the United States quitclaimed its interest in the submerged lands adjacent to the property previously conveyed to Plaintiff.

Plaintiff alleges that the Town of Long Island ("Town") has asserted interests in the submerged lands adverse to his ownership interests. In Count III of his Complaint, Plaintiff seeks damages from the Town related to its use of his submerged lands.[1] Although Count II of his complaint does not explicitly state the grounds on which he seeks damages, the Count states that Defendant's actions have caused Plaintiff losses and that Defendant has been unjustly enriched through the use of Plaintiff's property without just compensation.

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[1] The Court notes that Count I of Plaintiff's Amended Complaint, which sought to quiet title to certain roadways on Plaintiff's land, has already been dismissed on *res judicata* grounds. See Order on Def.'s Mot to Dismiss (July 2, 2002). That order expressly dismissed damages claims arising out of the use of the roadways. Since Plaintiff has pled no other causes of action seeking damages, Plaintiff's damage claim applies only to damages arising out of the submerged lands.

DISCUSSION

I. Standard of Review

Summary judgment is proper where there is no genuine issue of material fact. Rogers v. Jackson, 2002 ME 140, ¶ 5, 804 A.2d 379, 380. In considering a motion for summary judgment, the court gives the party opposing summary judgment the benefit of any inferences that might reasonably be drawn from the facts presented. Curtis v. Porter, 2001 ME 158, ¶ 9, 784 A.2d 18, 22. When the defendant seeks summary judgment, it bears the burden of showing that the evidence fails to establish a prima facie case for each element of the plaintiff's cause of action. Stewart v. Aldrich, 2002 ME 16, ¶ 8, 788 A.2d 603, 606; Corey v. Norman Hansen & DeTroy et al., 1999 ME 196, ¶ 9, 742 A.2d 933, 938. "A judgment as a matter of law in a defendant's favor is proper when any jury verdict for the plaintiff would be based on conjecture or speculation." Champagne v. Mid-Maine Med. Ctr., et al., 1998 ME 87, ¶ 9, 711 A.2d 842, 845.

II. Compliance M.R. CIV. P. 56(h)

Preliminarily, the court notes that many of the statements of material facts submitted by Defendant on December 23, 2003 fail to comply with M.R. Civ. P. 56(h). See Def. Town of Long Island's Statement of Material Facts in Support of Motion for Partial Summ. J. ("SMF") ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 11, 18 & 19. Specifically, a number of Defendant's statements either in whole or in part are not accompanied by a specific record citation, see SMF ¶¶ 2, 3, 4, 5, 8, 11 & 19, or cite to record material that does not support the statements made. See SMF ¶¶ 6, 7, 18; see also M.R. Civ. P. 56(h)(4) (stating that the "court may disregard any statement of fact not supported by a

specific citation to record material"); Doyle v. Dep't of Human Servs., 2003 ME 61, ¶ 12, 824 A.2d 48, 53 (holding that statements of material facts must contain specific record references). In addition, Defendant's record citation for its first statement of material fact is overly broad. See M.R. Civ. P. 56(h)(4) ("An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion).

Defendant's argument that there is no evidence to support these statements because no evidence exists is unavailing. Affidavits and deposition testimony could have been used to support the alleged statements. For example, in SMF ¶ 3, Defendant asserts: "Plaintiff has not complied with the notice provisions of the Maine Tort Claims Act. He has not alleged such compliance, and has no evidence that he provided the requisite notice to the Town within 180 days of the accrual of his causes of action." This statement could have been supported by an affidavit from an appropriate Town official.

Accordingly, SMF ¶¶ 1, 2, 3, 4, & 5 in their entirety, and parts of SMF ¶¶ 6, 7, 8, 11, 18 & 19, will not be considered by the court in its review of Defendant's motion. See M.R. Civ. P. 56(h)(1); Doyle, 2003 ME 61, ¶¶ 10-11, 824 A.2d at 52-53 (holding that the court need not consider statements of material facts that do not comply with Rule 56).

III. Damages for Regulatory Taking

Both the Constitution of the United States and the Maine Constitution prohibit uncompensated takings by the government. See Me. Const. art. I, § 21; U.S. Const. Amend. V. Maine's Constitution provides that "[p]rivate property shall

not be taken for public uses without just compensation, nor unless the public exigencies require it." Me. Const. art. I, § 21. Similarly, the Fifth Amendment of the United States Constitution prohibits the taking of private property "for public use without just compensation." U.S. Const. Amend. V. States are subject to the Fifth Amendment via the incorporation clause of the Fourteenth Amendment. See Dolan v. City of Tigard, 512 U.S. 374 (1994).

Regulations authorizing physical occupation of a person's property no matter how minor, require compensation. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). To determine whether a regulatory taking has occurred, both the United States Supreme Court and the Maine Law Court look at the following three factors: (1) the economic impact of the regulation on the claimant (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. See Daley v. Comm'r, Dep't of Marine Res., 1997 ME 183, ¶ 7, 698 A.2d 1053, 1056, n.7 (citing Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986)).

In the present case, Plaintiff claims that the Town's regulation of his submerged lands amounts to a regulatory taking and entitles him to damages under the United States and Maine Constitutions. Defendant argues that Plaintiff has failed to show that anyone acting in an official capacity for the Town has taken any of his submerged lands for a public use, and hence, Plaintiff is not entitled to pursue his constitutional damages claims. See generally Michaud v. City of Bangor, 196 A.2d 106 (Me. 1963). However, Plaintiff's opposing statement of material facts establishes that the Town's Harbormaster, acting in his official capacity, told people that they had the right to moor their boats on the submerged lands. See OSMF ¶ 12.

In addition, Plaintiff's opposing statement of material facts established that several of the Town Selectmen have asserted the right to control the submerged lands. See OSMF ¶ 6. These statements create a genuine issue of material fact as to whether there was a regulatory taking by individuals who were acting in their official capacities as agents for the town, as well as whether Plaintiff is entitled to damages for a regulatory taking of his property.

Accordingly, Defendant is not granted summary judgment on any damages claims brought under the theory that the Town's regulation of his property amounts to a taking under Maine and United States Constitutions.

IV. Maine Tort Claims Act

Defendant asserts that any claim for damages under the Maine Tort Claims Act must be dismissed for the following reasons: (1) the Town has immunity under the Act; (2) the Plaintiff has failed to plead, and has set forth no evidence of compliance with the notice provisions of the Act; (3) the Act expressly prohibits Plaintiff's claims; and (4) the claims are barred by the applicable statute of limitations.

Town's Immunity

The Maine Tort Claims Act governs all tort claims against any governmental entity, including all political subdivisions such as the Town of Long Island. 14 M.R.S. § 8102(3) (2003). Under the Act, all governmental entities are immune from suit on any and all tort claims seeking recovery of damages unless immunity is removed by one of the exceptions to absolute immunity. 14 M.R.S. § 8103 (2003). The exceptions to absolute immunity are as follows: (1) the ownership,

maintenance or use of vehicles; (2) public buildings; (3) discharge of pollutants; and (4) road construction, street cleaning, or repair. 14 M.R.S. § 8104-A (2003).

In the case at bar, based on the statements of material facts before the court, Defendant correctly asserts that the Town is immune from any tort claims brought by Plaintiff. None of the alleged acts of the Town or its officials falls under any of the four exceptions. Accordingly, Defendant is entitled to summary judgment on all tort-based damages claims.

Compliance With Notice Provisions, Express Prohibition of Plaintiff's Claims, Statute of Limitations

Given that the court has determined that Defendant is entitled to summary judgment on all tort-based damages claims, it does not reach Defendant's additional arguments for barring Plaintiff's damages claims under the Maine Tort Claims Act.

DECISION

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is:

The Town's Motion for Summary Judgment on Plaintiff's Count III claim for damages pursuant to a regulatory takings theory is DENIED.

Appendix C-8

The Town's Motion for Summary Judgment on Plaintiff's Count III claim for tort-related damages is GRANTED.

Dated at Portland, Maine this 26th day of May 2004.

Robert E. Crowley
Justice, Superior Court